IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

- - -

SIGHT SCIENCES, INC.,

Plaintiff,

v

IVANTIS, INC.,

Defendant.

: CIVIL ACTION NO.

: 21-1317-VAC-SRF

- - -

Wilmington, Delaware
Thursday, June 2, 2022
Telephone Conference

- - -

BEFORE: HONORABLE SHERRY R. FALLON, U.S. Magistrate Judge

APPEARANCES:

- - -

YOUNG CONAWAY STARGATT & TAYLOR, LLP
BY: MELANIE K. SHARP, ESQ.,
AND, TAYLOR E. HALLOWELL, ESQ.

and

COOLEY LLP
BY: ORION ARMON, ESQ.,
(Denver, Colorado)

and

COOLEY LLP
BY: MICHELLE S. RHYU, ESQ.,
DAVID MURDTER, ESQ.,
AND, EMILY M. ROSS, ESQ.
(Palo Alto, California)

Counsel on behalf of
Sight Sciences, Inc.

APPEARANCES: (Continued)

SHAW KELLER, LLP
BY: JOHN W. SHAW, ESQ.

and

KIRKLAND & ELLIS, LLP
BY: GREGG LOCASCIO, ESQ.
AND, JUSTIN BOVA, ESQ.
(Washington, District of Columbia)

and

KIRKLAND & ELLIS, LLP
BY: KAT LI, ESQ.
(Austin, Texas)

Counsel on behalf of Ivantis, Inc.

- oOo -

P R O C E E D I N G S

(REPORTER'S NOTE: The following telephone conference was held remotely, beginning at 11:00 a.m.)

THE COURT: Good morning everyone. This is Magistrate Judge Sherry Fallon joining the Rule 16 scheduling conference in Sight Sciences versus Ivantis.

Let me find out first if we have our court stenographer on the line, Mr. Gaffigan.

THE COURT REPORTER: Yes, Your Honor. I'm on the line. Good morning.

THE COURT: Good morning. Thank you.

My law clerk, Ms. Polito is on the line.

And we will now start with appearances of counsel beginning with Delaware counsel for the plaintiff.

MS. HALLOWELL: Good morning, Your Honor. This is Taylor Hallowell from Young Conaway Stargatt & Taylor on behalf of Sight Sciences.

Melanie Sharp from Young Conaway is also on the line, along with Stephanie Vangelo who is a summer associate here at Young Conaway.

And we are joined by Orion Armon, Michelle Rhyu, David Murdter, and Emily Ross from Cooley.

THE COURT: All right. Thank you. And welcome to the summer associate who is joining.

I'll now ask for the same introductions on behalf of defendant, beginning with Delaware counsel.

MR. SHAW: Good morning, Your Honor. This is John Shaw for defendant Ivantis.

Joining me from Kirkland & Ellis are Greg LoCascio, Kat Li, and Justin Bova.

THE COURT: Very well. I have reviewed the proposed scheduling order submitted by the parties. I have also looked at the docket to generally familiarize myself with the patent issues that are the subject of the litigation which I'll generally say involves treatment of glaucoma with intraocular implants.

As you know, this is assigned to the Vacant Judgeship so absent assignment of an Article III judge and absent consent of the parties to my jurisdiction, as the Magistrate Judge, I cannot assign a pretrial date or a trial date for this case at this time. So we'll go forward with plugging in as much of the balance of the schedule as I can do presently, and I will resolve any disputes between the parties concerning the scheduling order on this call.

So with that, let me turn to the first section where the parties differ. Subparagraph 3, or I'm sorry, 2(g) on page 3, requests, number of Requests For Admission.

The plaintiff wants to include a provision for document authentication, an unlimited number.

Let me hear from the plaintiff on that and then I will hear from the defendant.

MS. SHARP: Good morning, Your Honor. Melanie Sharp.

With respect to the RFAs, Sight Sciences seeks an unlimited number of RFAs for authentication. We originally I think in our discussions back and forth reached agreement on that proposition, but then as we were negotiating various iterations we moved off of that.

We have, in a more recent meet-and-confer, agreed that the best way to address authentication is by a stipulation, but of course the devil is in the details when it comes to negotiating a stipulation.

Unlimited RFAs are common here and unlimited RFAs for the purpose of authentication will incentivize the parties equally to reach a stipulation so that neither side has to issue or respond to RFAs about authentication. If we don't provide here for that mechanism, the parties will be unequally situated in their bargaining position with respect to authenticating documents.

So Sight Sciences' request is to add an unlimited number of Requests For Admission for authentication understanding the matters will work together to stipulate around that, if possible.

THE COURT: All right. Does the defendant care

to respond at this time?

MS. LI: Good morning, Your Honor. Kat Li on behalf of defendants.

With respect to the unlimited RFAs proposal, as Ms. Sharp has stated, we believe that the more effective route is to negotiate a stipulation which we are open to.

In the event that a stipulation is not negotiated, which we don't think is likely, we believe that there are other vehicles that would be more effective to addressing a dispute between authentication. We believe that the potential for -- we believe that having unlimited RFAs has the potential for abuse by having, you know, unlimited, thousands of RFAs being served.

If there is a dispute about authentication, we would work in good faith prior to the trial to resolve those issues. We think it's premature right now to try to resolve it at this stage of the case, when we don't even know what disputes are. We also believe that not only are stipulations common, but if they aren't reached, then closer to trial what we can do is do things like have a specific number of RFAs that address the disputed documents or have proposed pretrial orders that deal with authentication so that they avoid Court intervention.

THE COURT: Thank you both sides. I'm going to adopt the defendant's position on this, and here is why:

It's certainly without prejudice to either side to seek additional relief if additional RFAs are needed for document or documents. I think the parties can be reasonable with one another about that, and it's a little bit premature and speculative at this point to know just how many RNAs relating to authentication of documents will be needed in the case, and I think the parties can effectively address that through stipulation or meet and confers, and the RFA maximum of 50 requests without the unlimited qualifier for document authentication is typical in what I put in my scheduling orders. So given that the defendant's position is consistent with that, we'll utilize that, but as I said it's without prejudice to either side.

The next issue is the following subparagraph, paragraph (h)(ii), limitation on hours for deposition discovery.

I will hear plaintiff on that, and I also want plaintiff to address is the likely that there are going to be foreign language depositions involving translation? I didn't get that feel from reading the pleadings, but I certainly don't know the witnesses and/or fact witnesses and/or experts that may be engaged in this case.

MS. SHARP: Your Honor, Melanie Sharp.

In connection with the deposition hours request, Sight Sciences is in the process of amending the complaint

to add several entities that are Alcon entities. We are in discussions with opposing counsel in connection with perhaps stipulating to certain amendments, and we have reached agreement with respect to several entities. We have not yet reached agreement to amend to add Alcon, the parent.

On the question of foreign language depositions, it is the addition of these parties by way of amendment that will introduce perhaps the foreign language, foreign language challenge.

The parties here are not similarly situated when it comes to the issue of depositions.

Sight Sciences is a quite small company with fewer than 200 employees so the universe of potential deponents is quite limited.

Ivantis, on the other hand, was acquired by Alcon entities, and the entities that will be added by stipulation or by motion practice are quite large entities. For example, Alcon Vision, which is the US operating company, has more than 20,000 employees.

So for those reasons, plaintiff is seeking more deposition hours to address those additional entities. That's a challenge that defendant Ivantis will not be confronted with, which is why we believe that they should have relatively fewer deposition hours.

THE COURT: All right. Let me hear from

Ivantis.

MR. LoCASCIO: Good morning, Your Honor. It's Greg LoCascio from Kirkland & Ellis.

So our starting point is both sides should get the same number of hours. And the reason for that is actually what we just heard from the Sight Sciences folks supports it. What is really going on here is the party that allegedly was infringing, this Ivantis business, actually has less employees than Sight Sciences. It's got 150 to 200 employees. It was acquired by Alcon actually a few months ago, sort of after the suit began.

And so the suggestion now that Alcon needs to be a party, which, you know, we'll get to as to why and for what reason, but at base from a discovery standpoint, all the alleged design decisions, acts of infringement, every-thing necessary to bring the case happened pre-acquisition.

And so as a general matter, I think both sides should get the same number of hours, but the rationale offered that now there is sort of a larger entity Alcon doesn't do anything to change the equation here. The parties should have the same number of hours.

Ultimately, if there is some need, of course, it is without prejudice for either side to say, well, there is more than I thought there was, I need to come back for hours. But their initial disclosures on the other side,

identify the CEO of Alcon, for instance, hopefully we won't have to come back on *Apex* issues and other unnecessary efforts to perhaps try to use discovery as a lever, but on the merits of this case, the parties share the same number of hours. The discovery is almost exclusively or very largely basely on Sight and Ivantis, the sub that has now been acquired. So we think it is 85 per side.

On the foreign language issue, I don't think there is anybody -- nobody -- I don't think either side has really identified folks that are going to need that.

Ultimately, I don't have an inherent aversion to the concept of there is a factor applied when you bring a translator in, but, you know, I don't think that is a need right now and something probably the parties can get to, but that, that is the footnote on this versus the overall hours.

THE COURT: On the --

MS. SHARP: Your Honor.

THE COURT: All right. Go ahead. You may respond, Ms. Sharp.

MS. SHARP: In connection with the acquisition, Alcon and the Alcon entities obviously were quite active, so certainly the involvement of Alcon in connection with the acquisition and any other involvement in connection with the infringement would be discoverable.

I don't agree with the proposition that there is

nothing pre-acquisition that implicates Alcon.

The discovery of Alcon is also necessary in connection with damages. It's clear that the Alcon parent has sponsored many of the marketing efforts which -- and this constitutes the basis for the, one of the bases for the motion to amend. So discovery of the additional Alcon entities is necessary, so the 200 person limit in Ivantis is not what controls here.

THE COURT: Understood. But as this stage, I guess until the pleadings are amended and the case starts to take form as it progresses, I am all about balance in the initial scheduling order. So I'll adopt defendant's position, but I will bump up the 85 hours to 90 hours for each side. And then it is without prejudice for either side to make an application to the Court that it needs additional time consistent with the reasoning that I have heard on this call or for any other reasons that are yet unknown and developed during the course of discovery in this case. So I'll adopt the defendant's position with respect to that and bump it up from 85 to 90 hours.

The next section I want to take the parties to is not a section that was flagged by either side but one which came up on my radar when I reviewed this scheduling order. And that is on page 5, subparagraph I believe it's 3(k), or it might be 2(k), but it's subsection (k) on that

page, page 5, fact witnesses to be called at trial, and the three bullet points would follow from that.

In looking at it, if I take out the chronology because these events, beginning with sub-part (k)(1) are triggered from the close of expert discovery, which going back to previous pages closes under paragraph 2 on November 16th. So if I took out the timeline under these three sub-parts, that would take it out to, under sub-part 3, to February of 2024, which is beyond the deadline in paragraph 14 for filling case dispositive and *Daubert* motions in December of 2023. That would take it out two months past, if the parties utilize these provisions.

Now, there is always a possibility that no additional depositions will be needed, but in any event, if there are, you are taking those depositions after the deadline for completing submission of case dispositive and *Daubert* motions, and the last thing the Court really wants, that burns up both the resources of the parties as well as the resources of the Court, to have to supplement existing briefing if these depositions are taken after the fact.

So any thoughts about that? Do you want to leave the dispositive motion deadline as is and take chances that these depositions won't come about or won't interfere with the briefing schedule? I need to know your preferences or if you have any concerns if I'm being overly concerned

about it.

Let me hear first from the plaintiff.

MS. SHARP: Your Honor, we appreciate you flagging this. It isn't anything that we had focused on in terms of timing.

I do not believe that we ought to change the case dispositive deadline given where it falls in connection next with what should be the projected trial date.

What I would propose is that the parties should revisit this provision, which we would hope would not necessarily be used and try to come up with a tighter schedule that would keep us closer to being on track with the case dispositive motion, and that we, the parties do that within seven days.

THE COURT: All right. Any objection by defendant to the adopt the proposal?

MR. LoCASCIO: No, no objection to that, Your Honor. And I would echo the parties -- I think, I think our understanding is it comes from, at least was built off in part some of your default guidelines, and I think probably so since we have been in situations where you have a fact witness where you need a dep before trial because they were never deposed.

I think inherent on both parties will be between initial discovery and discovery responses identifying

witnesses so nobody has a situation where they feel like they have been sandbagged, but, you know, for various reasons sometimes a fact witness shows up late. And I think both sides just want the insulation or protective approach from your guidance that would allow us to make sure that person couldn't, you know, sneak through un-deposed.

And it sounds like the plan will be to sort of work on that a little bit vis-à-vis the timing. I don't know that I have an inherent problem with that the parties agree collectively to say that that kind of clean up dep. could happen after dispositive motions because I think it is in both parties' interest not to have the schedule flip anymore.

But we will work something out and come back to up; and if you have views or guidance on that, like you think it ought to be hard and fast that that happens before the briefing is closed on those motions, that that is fine.

I think my experience has been that sometimes the witness list process is happening after dispositive motions, which is what this was designed to capture.

THE COURT: Yes, I think you are probably right. I think there are, let me say, probably going to be very rare situations where an after-the-fact witness deposition is going to upset or disrupt the briefing of dispositive motions and/or *Daubert* motions. I think where it more comes into play as more of a problem perhaps is if witnesses,

after-the-fact witnesses are taken too close perhaps to the pretrial conference date and an issue crops up about certain testimony that one side or the other wants to either object to admissibility or whatever. That just creates a conundrum for the Court because, you know, by the time you get to the pretrial conference, it's hoped that whatever evidentiary issues the Court is going to have to deal with are set out either in the motions in limine or in the pretrial order, and that once that is done and the order is entered and the parties go forward with trial, the Court doesn't want any late breaking evidentiary issues on the horizon with witnesses that could have been vetted earlier but were not. And I think that is the main concern there.

So in any event, I will let the parties flush that out and, you know, address it however the parties think best in a revised form of scheduling order that you will get to me within ten days -- I'm sorry, seven days of this conference, and that will be fine.

If you don't alter it, that's fine. I mean you just deal with these things as they come up. Both sides I hope will be reasonable in recognizing that the whole objective here with this scheduling order is case management and not having after-the-fact issues disrupt the balance of the schedule that remains when they arrive.

Moving ahead to the status report and status

conference, page 8.

The status report at paragraph 7 on January 12 of next year is fine with me. I usually like to hold a status teleconference after that, so I'll give the parties a date of January 18, 2023 at 10:00 a.m.

If, when you submit your status report, both sides feel that there is really nothing going on at that time like a discovery dispute or anything that would require action by the Court, you can mutually request in that status report that I cancel the status teleconference. I'm not interested in wasting your time if there is no reason to be touching base with the Court both in your written report and then a teleconference if the teleconference is unnecessary. I don't have a problem canceling it if the parties mutually request it.

And as far as the balance of the schedule, I cannot, under our standing order regarding the Vacant Judgeship, I can't give a *Markman* hearing date, nor the date a *Markman* decision might be issued or pretrial conference date or trial date at this time because this is a Vacant Judgeship case.

So I think that is the extent of what we can do on our call today. I'll look for the parties' proposed revised scheduling order. And when I get it, I will sign it and enter it on the docket.

With that, is there anything further that we need to address on behalf of the plaintiff?

MS. SHARP: Nothing, Your Honor. Thank you.

THE COURT: Anything further from the defendant?

MR. LoCASCIO: Nothing here, Your Honor.

THE COURT: All right. Thank you, counsel. I appreciate your time today, and I will look for the scheduling order. We are adjourned. Thank you.

MS. SHARP: Thank you.

MR. LoCASCIO: Thanks.

(Telephone conference ends at 11:23 a.m.)

CERTIFICATE

I HEREBY CERTIFY that the proceedings were taken by me and that the transcript is a true and accurate record of the proceedings.

/s/ Brian P. Gaffigan
Brian P. Gaffigan
Registered Merit Reporter
Federal Certified Realtime Reporter
Michigan Certified Shorthand Reporter
North Carolina Certified Shorthand Reporter
Dated: June 5, 2022

(The foregoing certification of this transcript does not apply to any reproduction of the same by any means, unless under the direct control and/or supervision of the certifying reporter.)